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No. 01-1229

In the Supreme Court of the United States

PIERCE COUNTY, PETITIONER

v.

IGNACIO GUILLEN, LEGAL GUARDIAN OF JENNIFER GUILLEN AND ALMA GUILLEN, MINORS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Under 23 U.S.C. 152, a State that wishes to obtain federal funding for a highway safety improvement project must identify hazardous locations, assign priorities for the corrections of such hazards, and establish and implement a schedule for their improvement. Section 409 of Title 23 restricts the availability in discovery and use in litigation of reports and data "compiled or collected" by a State pursuant to Section 152 for the purpose of developing a highway safety improvement project that may receive federal funds.

In this brief the United States addresses the following questions:

1. Whether the decision of the Supreme Court of Washington was a final judgment of that court that this Court has jurisdiction to review by certiorari under 28 U.S.C. 1257(a).

2. Whether respondent may pursue a challenge that the privilege of Section 409 exceeds Congress's powers under Article I of the Constitution, given that the State of Washington and petitioner do not object to that provision.

3. Whether the Supreme Court of Washington erred in concluding that the privilege under Section 409 covers reports and data that were "collected" by a local governmental entity for purposes other than highway safety under Section 152 and that remain in the custody of the official or department that originally obtained the information for non-Section 152 purposes.

4. Whether, properly construed, the privilege afforded by Section 409 for reports and data "collected" for Section 152 purposes is a valid exercise of Congress's powers under Article I of the Constitution.

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OPINIONS BELOW

The opinion of the Supreme Court of Washington (Pet. App. A1-A132) is reported at 31 P.3d 628. The opinion of the Washington Court of Appeals (Pet. App. H1-H28) is reported at 982 P.2d 123. The orders of the Superior Court of Washington (Pet. App. C1-C4, D1-D2, E1-E2, F1-F5) are unreported.

JURISDICTION

The judgment of the Supreme Court of Washington was entered on September 13, 2001. A petition for rehearing was denied on November 27, 2001 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on February 22, 2002, and was granted on April 29, 2002. On June 3, 2002, this Court granted the motion of the United States to intervene, pursuant to 28 U.S.C. 2403(a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a).[1]

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 409 of Title 23, United States Code, provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Pertinent constitutional provisions are reproduced in the appendix to the certiorari petition (Pet. App. J1-J2).

STATEMENT

1. "Fatalities and injuries sustained in traffic accidents continue to be a major health problem in the United States. Traffic accidents are the leading cause of death of people from 6 to 28 years of age and result in more permanent disabling injuries than any other type of accident." United States Dep't of Transportation, *The 1996 Annual Report on Highway Safety Improvement Programs* S-1 (1996) (*1996 DOT Report*) (lodged with the Clerk).

[1] Respondents contested this Court's jurisdiction. See Br. in Opp. 5-10. For a discussion of the jurisdictional question, see pp. 17-22, *infra*.

In Title 23 of the United States Code, Congress has established several programs that promote national transportation safety by providing funding to the States to reduce the number and severity of traffic accidents. For example, the Secretary of Transportation may award grants to the States to improve railroad-highway safety crossings, see 23 U.S.C. 130, to replace and rehabilitate highway bridges, see 23 U.S.C. 144, and, as pertinent here, to ameliorate hazardous road conditions, see 23 U.S.C. 152. These provisions are part of a "comprehensive federal plan to promote highway safety." *Reichert* v. *Louisiana*, 694 So. 2d 193, 198 (La. 1997).[2]

Under the Hazard Elimination Program established by 23 U.S.C. 152, if a State wishes to obtain funds from the federal government for road hazard improvement projects, the State must "conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations," must "assign priorities for the correction of such locations," and must "establish and implement a schedule of projects for their improvement." 23 U.S.C. 152(a)(1). States and local governments are thus required to engage in extensive analysis and evaluation of road conditions within their respective jurisdictions if they wish to apply for federal funds for transportation safety improvement projects. See also 23 C.F.R. Pt. 924.

Congress became concerned that States and local governments might not be fully thorough and candid in assembling

[2] The Department of Transportation's most recent report to Congress about the Hazard Elimination Program established by 23 U.S.C. 152 reported that the program "has accomplished reduction in fatal, nonfatal-injury, and combined fatal-plus-nonfatal- injury accident rates of 51, 27, and 27 percent, respectively. * * * Evaluations of improvements made under the Hazard Elimination Program indicate that the program has helped to prevent more than 26,500 fatalities and 760,000 nonfatal injuries since 1974." *1996 DOT Report* S-3 (emphasis omitted).

and evaluating such safety-related information if that information could later be used against them in litigation.[3] To address that problem, in 1987 Congress enacted Section 409 of Title 23, which (as originally enacted) restricted the introduction into evidence in federal and state court of reports and data "compiled" by a state or local government for the purpose of federally funded transportation-safety improvement. See Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 132(a), 101 Stat. 170.[4]

Congress subsequently enacted two amendments to Section 409 to remedy perceived deficiencies in that law. First, in 1991, Congress provided that reports and data compiled

[3] See S. Rep. No. 4, 100th Cong., 1st Sess. 27-28 (1987); see also H.R. Rep. No. 665, 99th Cong., 2d Sess. 56 (1986) (proposed privilege was intended "to encourage greater accuracy and completeness in the compilation of such lists [of hazards], by preventing these lists from being used in any judicial proceeding, thereby improving their quality as a basis for programming"); H.R. Rep. No. 768, 98th Cong., 2d Sess. 17 (1984) (similar); *Extension of the Nation's Highway, Highway Safety, and Public Transit Programs: Hearings Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 99th Cong., 1st Sess. 889 (1985) (testimony of Richard E. Briggs, Association of American Railroads).

[4] As initially enacted, Section 409 provided:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. 409 (1988).

for Section 152 purposes should be privileged from discovery, as well as inadmissible in evidence, in federal and state court litigation. See Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1035(a), 105 Stat. 1978; 23 U.S.C. 409 (1994).

Second, in 1995, Congress responded to a series of lower court decisions that had registered conflicting views on whether Section 409 barred disclosure of reports and raw data that a state or local governmental entity had collected from elsewhere for the purpose of preparing an application for Section 152 funds, or only documents that the governmental entity had itself generated for such purposes. That disagreement in the lower courts turned on the meaning of the word "compiled" in the original version of Section 409.[5] Congress determined that the privilege of Section 409 should reach "raw data collected prior to being made part of any formal or bound report" that a State submitted as part of an application for funds under Section 152, as well as any document that the State itself generated. See H.R. Rep. No. 246, 104th Cong., 1st Sess. 59 (1995); H.R. Conf. Rep. No. 345, 104th Cong., 1st Sess. 90 (1995). Accordingly, Congress amended Section 409 to provide as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data *compiled or collected* for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the

[5] Compare *Southern Pac. Transp. Co.* v. *Yarnell*, 890 P.2d 611, 612 (Ariz.) (adopting narrower construction), cert. denied, 516 U.S. 937 (1995); *Wiedeman* v. *Dixie Elec. Membership Corp.*, 627 So. 2d 170, 173 (La. 1993) (same), cert. denied, 511 U.S. 1127 (1994); and *Tardy* v. *Norfolk S. Corp.*, 659 N.E.2d 817, 820 (Ohio Ct. App.) (same), appeal not allowed, 655 N.E.2d 187 (Ohio 1995) (Table), with *Robertson* v. *Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (adopting broader construction).

> purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. 409 (emphasis added).

2. In May 1995, based on accident reports and data in its possession, petitioner Pierce County identified an intersection within the County as especially hazardous. Pursuant to 23 U.S.C. 152, the County applied to the Washington Department of Transportation for federal funds to eliminate the hazard at that intersection. The County's initial application for federal funds was denied. In 1996, the County again applied for federal funds, and its application was granted. See Pet. App. A6.

In July 1996, three weeks before the County's application for federal funds was granted, Clementina Guillen-Alejandre was killed and her passengers were injured in an automobile collision at the same intersection. See Pet. App. A6. Relying on the State of Washington's Public Disclosure Act (PDA), Wash. Rev. Code Ann. § 42.17.310 (West 2000), respondent Ignacio Guillen, Clementina's surviving spouse, submitted a request to the County for materials and data relating to the intersection's accident history. Guillen stated, through counsel, that he was "not seeking any reports that were specifically written for developing any safety construction improvement project at the intersection at issue," but was seeking "all documents that record the accident history of the intersection that may have been used in the preparation of any such reports." Pet. App. A7. The County declined to release the requested information, claiming it was privileged under Section 409. See *id.* at A8-A9.

3. a. Guillen brought suit against the County in Washington Superior Court under the state PDA, challenging the County's denial of access to the requested materials. The Superior Court rejected the County's claim of privilege under Section 409, and ordered the County to disclose (as pertinent here) four sets of materials: (1) a list of accidents at the intersection originally prepared by the Washington State Patrol, showing the location, date, time, and nature of the accident, which the County subsequently obtained for the purpose of conducting a study of the safety of the intersection; (2) and (3) two collision diagrams prepared by a county employee responsible for investigating accidents at the intersection; and (4) reports of accidents at the intersection prepared by law enforcement agencies investigating the accidents.[6] See Pet. App. A9-A12, C3-C4, H2-H3 (identifying and describing documents). The court also awarded attorney's fees to Guillen under the state PDA. *Id.* at C3. The County appealed the Superior Court's disposition of the PDA action to the Washington Court of Appeals.

b. While that appeal was pending, Guillen filed a tort action against the County in Superior Court, alleging that the County's failure to install proper traffic controls at the intersection was a proximate cause of Clementina's death. See Pet. App. A12. Through discovery in the tort action, Guillen sought information bearing on the accident history of the intersection. The County moved for a protective order, claiming a privilege under Section 409, and Guillen moved to

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[6] The trial court also ordered the County to disclose a draft letter from the Director of the County's Public Works Department to a County Council member, which contained information used to prepare the County's application for federal funds for hazard elimination at the intersection. Pet. App. C3, H3. The Washington Court of Appeals subsequently reversed that part of the trial court's decision. *Id.* at H25. Respondents did not further pursue that document, and we do not discuss it further in this brief.

compel. The Superior Court rejected the County's privilege claim, and ordered the County to disclose various materials and data requested by Guillen.[7] See *id.* at A13-A14, F1-F5. The County sought discretionary appellate review of the Superior Court's discovery order. The Court of Appeals granted review, and consolidated the appeal in the tort case with the County's pending appeal in the PDA action. *Id.* at G5-G6.

4. The Washington Court of Appeals affirmed in pertinent part in each case. Pet. App. H1-H28. The court concluded that, to apply the "collected" prong of Section 409 properly, a court must distinguish between materials held by an agency such as a county law enforcement agency that collects information for reasons unrelated to Section 152, and materials held by an agency such as a county public works department that collects information for Section 152 purposes. The court stated that "Section 409 does not protect reports or data collected by the former, because the former was not acting pursuant to Section 152" when it collected the information. *Id.* at H18. To apply Section 409 to materials collected for purposes unrelated to Section 152, the court remarked, "would extend Section 409 far beyond its purpose," which was "to neutralize the litigation-aiding effect, if

[7] Those materials and data include (1) the identity of county employees with knowledge of automobile accidents that took place at the intersection between 1990 and July 1996; (2) the identity of persons who had been involved in accidents at the intersection during that period; (3) the identity of Pierce County deputy sheriffs who patrolled the intersection during that period; (4) the date, identity of persons involved, and identity of all fatalities at the intersection during that period; (5) a copy of all photographs that the County had of accidents at the intersection during that period; (6) a copy of all written statements by witnesses to accidents at the intersection during that period; and (7) a copy of all accident reports sent to the County by individuals who had been involved in accidents at the intersection during that period. Pet. App. A13-A14, F2-F4.

any, of Section 152 activity." *Id.* at H21. The court thus rejected the County's argument for a broad interpretation of Section 409, stating that the County's proposed construction would give the County "carte blanche to render immune from discovery every accident report related to a public road within its territory, simply by having its road department 'collect' the report." *Id.* at H22.

The court then determined that the disclosure orders under review were consistent with its interpretation of Section 409. See Pet. App. H22-H27. The court ruled, for example, that Guillen was entitled to the accident reports requested in the PDA action because, it stated, Guillen had "carefully requested reports in the hands of the sheriff or other law enforcement agencies, *not* reports or data 'collected or compiled' by the [county] Public Works Department 'pursuant to' Section 152." *Id.* at H22-H23.[8] The court also ordered the disclosure of the collision diagrams sought in the PDA action, even though those diagrams were actually used in preparing the County's Section 152 application, because (the court stated) the County had not met its burden of showing that the diagrams were prepared in the course of Section 152 activities. See *id.* at H23-H24. The court further affirmed the trial court's order enforcing discovery in the tort suit, on the ground that the information covered by Guillen's requests was not related to the County's request for Section 152 funds. *Id.* at H25-H26. Finally, the court affirmed the trial court's award of attorney's fees to Guillen

[8] In fact, the PDA requests sent by Guillen to the County and the complaint instituting the PDA action do not indicate that the PDA request was limited to the county sheriff's office. See J.A. 7, 29, 32-33. Nevertheless, the record in this case does leave open the possibility that the county sheriff's office, or some other law enforcement agency, might retain copies of the accident reports that that law enforcement agency had generated for routine law enforcement purposes but had then transmitted to the County's Public Works Department. See J.A. 53, 56-57.

in the PDA action, noting that Guillen "is entitled to all but one of his requests." *Id.* at H27.[9]

5. a. The Supreme Court of Washington vacated the decision of the Court of Appeals, and remanded the cases for further proceedings. See Pet. App. A1-A114.

The court first rejected the construction of the "collected" prong of Section 409 offered by the court of appeals. See Pet. App. A64-A70. The court thought it "unsound in principle and unworkable in practice" to distinguish between an agency (such as the Pierce County Sheriff's Department) that collected materials for reasons unrelated to Section 152, and an agency (such as the Pierce County Public Works Department) that subsequently collected the same materials for Section 152 purposes. *Id.* at A65. The court observed that "it cannot be assumed that all state and local governments maintain multiple sets of materials such as accident reports, each held by a separate agency for a different use." *Id.* at A66 (emphasis omitted). Although the court recognized that larger jurisdictions might maintain multiple sets of records, it suggested that smaller jurisdictions might rely on a single set of documents. See *id.* at A67. And the court suggested that, as "governments everywhere move from paper and microfiche documentation into the age of twenty-first century information technology," they will increasingly rely on a single set of digital records. *Id.* at A67-A68.

The court thus construed the "collected" prong of Section 409 broadly, to bar disclosure of reports and data in the hands of any local governmental agency that collected those materials even for reasons unrelated to federal funding under Section 152, as long as another entity within the local governmental unit also collected or compiled the same

[9] The Washington Court of Appeals noted that it had assumed that Section 409 is constitutional, as neither party had raised any constitutional objection to the statute. Pet. App. H28 n.26.

materials for a purpose related to Section 152. The court remarked that all of the information that Guillen had sought from the County appeared to be covered by Section 409 as so construed, regardless of the particular agency within the County that actually held the requested data or the purpose for which it was originally obtained. See Pet. App. A64, A66.

b. Having interpreted the "collected" prong of Section 409 broadly, the court then ruled that Section 409's application to all materials "collected" by any department of a State or local governmental entity that applies for Section 152 funds serves no legitimate federal purpose and exceeds Congress's Article I powers. Pet. App. A70-A114.[10] The court stated that "no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic accident materials and 'raw data' that were originally prepared for routine state and local purposes, simply because they are 'collected,' for, *among other reasons*, pursuant to a federal statute for federal purposes." *Id.* at A92-A93. Rather, the court held, "only publicly held materials and data that were originally *created* for the identification, evaluation, planning, or development of federally funded safety enhancement projects" are lawfully privileged under Section 409. *Id.* at A113-A114.

The court rejected the Spending Clause, the Commerce Clause, and the Necessary and Proper Clause as possible constitutional bases for Section 409 (as it had construed that statute). As for the Spending Clause (U.S. Const. Art. I, § 8, Cl. 1), the court acknowledged that Congress may seek "to influence state behavior by conditioning the receipt of

[10] Relying on federal decisions, the court ruled that Guillen had "standing" to challenge the constitutionality of Section 409 as exceeding Congress's power, even though state officials opposed that challenge and supported the validity of the law. Pet. App. A75-A78.

federal funds upon behavioral changes." Pet. App. A85. But, the court stated, the "strings" that condition the receipt of federal funds must be "firmly attached to a legitimate federal interest in a specific federal project or program." *Id.* at A92 (internal quotation marks omitted). The court concluded that Section 409 does not satisfy that constitutional "nexus" requirement because (under the court's broad construction of Section 409) even materials originally prepared for routine state and local purposes would be covered by the privilege. *Id.* at A92-A93.

As for the Commerce Clause (U.S. Const. Art. I, § 8, Cl. 3), the court acknowledged that "a sufficient nexus exists between interstate commerce and the Federal-aid highway system to justify the regulatory scheme when considered as a whole." Pet. App. A103-A104 (internal quotation marks omitted). Nevertheless, it held that Section 409 itself (as it had construed that statute) is not an "integral part of the regulatory program" advancing national transportation safety. *Id.* at A104. The court remarked that the "vital federal purposes" behind Section 409 are not "reasonably served by also barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been created." *Id.* at A105.

Finally, the court rejected the Necessary and Proper Clause (U.S. Const. Art. I, § 8, Cl. 18) as a grounding for Section 409. The court accepted that Congress has authority "to require state courts to enforce a federal privilege protecting materials that would not have been created but-for" federal programs such as Section 152. Pet. App. A107. The court concluded, however, that it was neither necessary nor proper to extend that privilege to materials "created and collected for state and local purposes, simply because they

are *also* collected and used for federal purposes." *Id.* at A107-A108.

The Washington Supreme Court thus curtailed the constitutionally permissible reach of Section 409 to materials and data that are originally created ("compiled") for the specific purpose of applying for Section 152 funding. Pet. App. A116-A117. The court further stated that the record "contains insufficient facts to apply this standard to all of the disputed items," and it therefore vacated the Washington Court of Appeals' decision and ordered a remand "for supplementation of the record and further proceedings not inconsistent" with its opinion. *Id.* at A114. The court affirmed the award of attorney's fees to Guillen in the PDA suit, however, "since the record suggests that he was entitled to at least four of the five items to which he was denied access in his PDA case." *Id.* at A113.

c. Justice Madsen, joined by two other members of the court, concurred in the result. See Pet. App. A115-A132. Justice Madsen rejected the majority's view that, under Section 409, "original police reports prepared for purposes unrelated to § 152, become privileged, even in the hands of the party that created them, once they have been 'collected' by any entity for purposes of § 152." *Id.* at A118-A119. He argued, rather, that the Section 409 privilege protects only the entity that collected the materials for a Section 152 purpose. See *id.* at A125-A127. Justice Madsen also remarked that, "[b]y preventing a litigant from gaining access to information that has been 'collected' for purposes of securing federal funding, Congress has made the litigant no better off than they would have been had the State not participated in the funding program." *Id.* at A127. He further observed that the canon of avoiding constructions that place statutes in constitutional doubt counseled against

the majority's broad construction of Section 409. See *id.* at A130-A131.[11]

SUMMARY OF ARGUMENT

I. A. This Court has jurisdiction to resolve the parties' controversy over the scope and validity of 23 U.S.C. 409. The Washington Supreme Court's decision is final at least as to Guillen's action seeking documents under the Washington Public Disclosure Act, for it directed the award of attorney's fees to Guillen, indicating that Guillen was entitled to a judgment ordering the disclosure of those documents. As to Guillen's tort claim, although the state supreme court's decision lies at an interlocutory stage of the case, it falls within the third exception outlined in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975).

B. Guillen may challenge the constitutionality of Section 409 as exceeding Congress's Article I powers. Guillen has Article III standing based on the alleged adverse effect of Section 409 on his state-created right to obtain information from the County. The County argues that, because neither it nor the State of Washington objects to Section 409, Guillen may not claim that Section 409 violates the Tenth Amendment's constitutional protection of state sovereignty. But the Washington Supreme Court did not rule that Section 409 interferes with state sovereignty, as that concept is usually understood. Nor did the lower court rule that the State or the County had been impermissibly "coerced" into accepting Section 409 as a condition of federal funds. Rather, the court ruled that Section 409's "collected" prong (as it construed that provision) serves no legitimate federal interest and therefore lies outside the bounds of Congress's Article I

[11] Like the majority, the concurring justices would have remanded the case because the record did not permit them to determine whether the disputed documents would be privileged under the correct interpretation of Section 409. See Pet. App. A132.

powers. This Court has adjudicated many claims by private persons affected by federal laws that those laws lie outside the reach of Congress's enumerated powers, including Congress's spending powers. The application of Section 409 in Guillen's case directly affects him, and therefore he may challenge that law.

II. A. Section 409 does not provide a privilege for records held by a local government agency that compiled or collected those records for routine local purposes entirely unrelated to federal highway safety programs such as 23 U.S.C. 152, even if that agency subsequently provided copies of those records to another agency for the transferee agency's Section 152-related purposes. That reading of the "collected" prong of Section 409, which is narrower than the construction placed on it by the Washington Supreme Court, finds support in the text, background and purposes of Section 409. The language of Section 409 does not suggest that, merely because materials have been "collected" by one agency for a Section 152-related purpose, all other persons from whom that agency obtained that information are retroactively covered by the privilege, even if the transferors collected the information only for routine local purposes.

Congress, moreover, enacted Section 409 to ensure that States and local governments would be candid and thorough in their evaluations of road hazards, by protecting them against the risk that information assembled to evaluate those hazards would then be used against them in litigation. There is no evidence to suggest that Congress intended to place potential tort plaintiffs in a worse position than they would have occupied if Section 152 had never been enacted, by extending the privilege to records in files routinely maintained by an agency that had never collected or used those records for a Section 152-related purpose. Rather, Congress retained an express statutory link between the

privileged information and the federal purpose for collecting and compiling the data.

B. A different situation arises if the information is stored only on a networked computer-based system that is accessible to state and local government agencies for Section 152-related purposes, among others. The United States Department of Transportation makes funds available to the States for the establishment and maintenance of computer-based storage of accident report information, in part to facilitate the evaluation of accident information necessary for applications for funds under Section 152. If a State stores its accident information only on such a computer system, the information would exist in only one place, and would have been "collected" in that place for Section 152-related purposes. The digitally stored information would therefore be covered by the privilege of Section 409. A remand may be necessary in this case to determine whether the information sought by Guillen is privileged under the proper construction of Section 409.

III. Properly construed, Section 409 is plainly a legitimate exercise of Congress's Article I powers. Section 409 falls within the reach of the Commerce Clause because it substantially furthers the national interest in transportation safety. The hazard elimination program of Section 152 removes unsafe obstacles to interstate commerce, and Section 409 ensures that that hazard elimination program is optimally effective. Similarly, Section 409 is a legitimate exercise of the Necessary and Proper Clause power because it serves to protect the efficacy of Congress's other, undisputably legitimate federal programs (including Section 152) that expend funds to promote transportation safety. Finally, Section 409 is a legitimate exercise of Congress's spending power because the privilege is designed to encourage States to detect and address hazardous highway conditions, and, properly construed, it applies only to materials and

information that were compiled or collected for that purpose. Given the firm support that the State of Washington and Pierce County show for Section 409, there is no basis for concluding that either was impermissibly coerced into accepting that privilege.

ARGUMENT

I. THE COURT HAS JURISDICTION TO RESOLVE THIS CONTROVERSY

The parties have raised two possible objections to the Court's authority to resolve this controversy. First, Guillen has argued that the Washington Supreme Court's decision was not a final judgment that this Court has authority to review under 28 U.S.C. 1257(a). See Br. in Opp. 5-10. Second, the County has maintained that Guillen lacks "standing" to challenge the constitutionality of Section 409. See Pet. 27-29. In our view, both arguments ultimately fall wide of the mark, but we address them in this brief because both arguments are not insubstantial, both may have implications for other cases, and either, if accepted, could prevent the Court from resolving the merits of an important constitutional dispute.

A. At Least As To Guillen's PDA Action, The Washington Supreme Court's Judgment Is Final

1. The judgment of the Supreme Court of Washington under review constituted that court's decision in two different actions that had been consolidated in the Washington Court of Appeals—the PDA suit in which the Superior Court had ordered partial summary judgment for Guillen, and the County's appeal of the Superior Court's interlocutory discovery order in the tort action. See Pet. App. G5-G6. The argument for finality is stronger in the PDA action. Both the Superior Court and the Court of Appeals ruled that Guillen was entitled to disclosure of four documents in the PDA suit and thus ruled that summary judgment was proper

as to those documents. See pp. 7-8, *supra*. The PDA case was therefore not in an interlocutory posture as it was presented to the Supreme Court of Washington.[12]

The Supreme Court of Washington remanded the consolidated cases because it found the record insufficient to apply the truncated version of Section 409 to "all of the disputed items." Pet. App. A114. Nonetheless, it also approved the award of attorney's fees to Guillen in the PDA action, and expressly noted that "the record suggests that [Guillen] was entitled to at least four of the five items to which he was denied access." *Id.* at A113. It is unlikely that the Washington Supreme Court would have awarded attorney's fees to

[12] The privilege conferred by Section 409 bars the protected materials from being "subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages." 23 U.S.C. 409. None of the state courts suggested that Section 409 might be applicable only to Guillen's tort action, and not also to his PDA suit. Nor did Guillen make such an argument in his brief in opposition to the County's certiorari petition. The question whether Section 409 applies at all in a PDA suit is therefore not before this Court.

As a general matter, Section 409 may not bar disclosure under state PDA-type statutes, because a suit to enforce a PDA law neither constitutes "discovery" nor in itself constitutes being "considered" for other purposes in an action for damages. In this case, however, the Supreme Court of Washington ruled that (a) the State's PDA was not intended to be used as a tool for pretrial discovery (or to avoid otherwise applicable limits on discovery) and (b) Guillen had no greater rights to disclosure under the state PDA in this case than under state pretrial discovery rules because litigation between Guillen and the County was reasonably anticipated when Guillen made his PDA request to the County. Thus, the Washington Supreme Court essentially concluded that the application of the PDA in this case would effectively amount to discovery in Guillen's action for damages against the County, and Guillen's PDA request was therefore subject to the limitation in Section 409. See Pet. A28-A30; see also *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804, 816 & n.14 (1986).

Guillen unless it believed that the PDA case had been conclusively resolved in his favor.[13]

2. The tort action presents a more difficult jurisdictional question. The Washington Supreme Court's decision in the tort action is not final in the literal sense. That decision addressed only a discovery order, and the lawsuit continues between the parties in the trial court. This Court, however, has not construed the finality requirement of Section 1257 in a "mechanical fashion," but has taken jurisdiction even under circumstances in which "there are further proceedings in the lower state courts to come." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975).

There are two potential obstacles to a conclusion that the decision under review in the tort action is final. First, the Washington Supreme Court did not affirm the Court of Appeals' ruling ordering the County to respond to Guillen's discovery requests, but rather remanded the case for application of Section 409—as truncated by that court to documents that were "compiled" (*i.e.*, originally created) for Section 409 purposes—and for supplementation of the record.[14] It may be, however, that the County has no basis for arguing on remand that any of the contested information that

[13] Under the Washington PDA law, "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record" shall be awarded attorney's fees. Wash. Rev. Code Ann. § 42.17.340 (West 2000). The Washington courts have generally construed the term "person who prevails" to require that the requester "ha[ve] an affirmative judgment rendered in its favor at the conclusion of the entire case." See *Overlake Fund* v. *City of Bellevue*, 855 P.2d 706, 710 (Wash. Ct. App. 1993); *Tacoma News, Inc.* v. *Tacoma-Pierce County Health Dep't*, 778 P.2d 1066 (Wash. Ct. App. 1989), review denied, 785 P.2d 825 (Wash. 1990) (Table).

[14] The County has argued that the remand applies only to the now-dismissed *Whitmer* action. See Pet. 6 n.1. The Washington Supreme Court's decision, however, does not distinguish between the two cases in its remand order.

remains at issue was originally generated by the County for Section 152-related purposes. If that is so, then "the ultimate judgment [of the state courts] on the federal issue [of discoverability] is for all practical purposes preordained." *Minnick* v. *California Dep't of Corrections*, 452 U.S. 105, 120 (1981).

Second, even if the federal issue is definitively settled, there remains the point that a discovery order ruling against a claim of privilege is ordinarily not considered final, at least where the party resisting discovery has not refused to comply with the order. Cf. *United States* v. *Ryan*, 402 U.S. 530 (1971).[15] The question then arises whether this case falls within any of the "exceptions" to the finality rule articulated in *Cox*, *supra*. As we understand the record, the one exception that might apply here is the third exception, under which this Court may hear a case if "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481; see *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 47-48 (1987).

If the information is disclosed to Guillen, and if the County eventually prevails in the state courts on Guillen's claim of negligence, then the County could not present its federal claim of privilege for this Court's review, and Washington courts would be bound by the Washington Supreme Court's decision in this case construing and invalidating Section 409. At the same time, it is not clear that if Guillen prevails at

[15] The fact that the County has not refused to comply with the discovery order is of less significance in this case than is usually true. If, on remand, the County refused to comply and was held in contempt, the County could appeal the contempt order (assuming state law provided for such an appeal) to the Washington Supreme Court, renewing its federal claim of privilege. There would be little point in requiring the County to make a second trip through the state court system where, as here, the highest court of the State has already definitively rejected all of its federal arguments. See *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 48 n.7 (1987).

trial (and on any state-court appeal from the verdict), the County will necessarily be able to seek this Court's review of its federal claim of privilege. For example, Guillen might not be able to use the information obtained in discovery at trial.[16] In either event, the County would have suffered the harm that Section 409 is designed to prevent—disclosure of privileged information—but would not be able to show that the disclosure had affected the ultimate judgment in Guillen's favor. Cf. *Ritchie*, 480 U.S. at 49; *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 83 (1997).

To the extent the matter is in doubt, the fact that this case involves a federal statute held unconstitutional should tip the balance in favor of review. Cf. *Cox*, 420 U.S. at 483 (observing that, under the fourth exception, the Court will review a case "if a refusal immediately to review the state-court decision might seriously erode federal policy.").[17] That is especially so since the Washington Supreme Court's ruling, quite apart from its impact on the tort suit, could chill state and local agencies more broadly in their preparation of materials for safety enhancement purposes. Cf. *id.* at 486.

3. There remains the possibility that, even if the decision below is not final in the tort action, this Court could review the lower court's decision in the PDA action. The Wash-

[16] See Pet. App. A35-A37 (Washington Supreme Court holding that, although certain kinds of accident reports are "confidential" under state law and are therefore inadmissible at trial, they are not privileged from disclosure in pretrial discovery).

[17] We do not maintain that the fourth *Cox* exception itself applies here. In particular, this does not seem to be a case "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox*, 420 U.S. at 482-483. The County has not argued, to our knowledge, that Guillen's tort action would have to be dismissed if Guillen were denied the information sought in the interrogatories.

ington Court of Appeals ordered the cases consolidated and "argued as one case." Pet. App. G6. Nonetheless, it does not appear that the state courts intended to treat the PDA action and the tort action as one case for finality purposes, in the sense that the state courts could not enter a final judgment in one until the other was completed. Presumably, for example, if the cases were remanded to the Superior Court, the cases could resume their separate identities, and the PDA case could be closed even while litigation continued in the tort action. Thus, it appears that the Court may exercise jurisdiction and render a decision on the scope and validity of Section 409 at least in the PDA action. Even if the Court lacks jurisdiction as to the tort action and must dismiss the petition in part, the parties would be free to move in the state courts for reconsideration of any orders in the tort action in light of this Court's controlling decision.

B. Guillen May Challenge 23 U.S.C. 409 As Exceeding Congress's Article I Powers

1. The County maintains that Guillen does not have "standing" to challenge the constitutionality of Section 409 on federalism grounds, given that that statute is supported by both the State of Washington and the County. See Pet. 27-29. Guillen plainly has standing in the Article III sense, however. Guillen alleges an adequate injury in fact from the application of the Section 409 privilege in his actions against the County. Absent the application of Section 409, Guillen would have a right under state law to the information that he seeks. The possibility that Section 409, which preempts conflicting state law, would deprive him of his state-law right to obtain that information is sufficient to endow him with Article III standing. Cf. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373-374 (1982) (injury to a right to obtain information created by statute is sufficient to support Article III

standing).[18] In any event, this Court's subject matter jurisdiction to entertain this case under Article III is satisfied by the fact that the state supreme court's decision below has a concrete and adverse effect on petitioner, the County, by requiring the County to disclose allegedly privileged information. Cf. *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 617-619 (1989).

2. The more difficult question is whether Guillen lacks "third-party standing" to assert what the County argues can only be the constitutional rights of States and local governments under the Tenth Amendment. This Court has emphasized that the question whether an individual litigant in state court such as Guillen can assert the federal rights of a third party (here, the State or the County) is little different from "whether a person in the litigant's position would have a [federal] right of action on the claim." *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 721 n.** (1990) (internal quotation marks omitted); see *City of Revere* v. *Massachusetts Gen. Hosp.*, 463 U.S. 239, 243 n.5 (1983) (observing that, in cases from state courts raising third-party standing issues, "standing and the merits are inextricably intertwined") (internal quotation marks omitted).

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[18] Although the right to obtain information at issue here was created by state, not federal, law, that distinction is not significant for Article III purposes. The injury to Guillen's state-created right to obtain information is sufficiently "distinct and palpable" (*Havens Realty*, 455 U.S. at 372) to support Article III standing. In an analogous context, this Court has frequently noted that virtually all property interests are creations of state law, and yet it has also recognized that the alleged deprivation of a state-created property interest is sufficient to establish an individual's standing to challenge the constitutionality of a federal law that allegedly impairs that property interest. See *Andrus* v. *Allard*, 444 U.S. 51, 64 n.21 (1979); see also *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 618-619 (1989) (ruling that petitioner had Article III standing based on deprivation of a state-created right by state supreme court's allegedly erroneous construction of federal law).

The County's argument that Guillen lacks standing under the Tenth Amendment rests principally on *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118, 144 (1939). In that case, state-chartered electric utilities challenged the constitutionality of the sale of electricity by the Tennessee Valley Authority (TVA), arguing they would be harmed by competition from electricity sold by TVA. This Court held that the utilities lacked standing because they had no protected "legal right" in avoiding competition from other sellers of electricity, private or governmental. See *id.* at 137-138, 139-140, 143-144. The Court also added, in response to the utilities' argument that the sale of electricity by the TVA violated the Tenth Amendment:

> The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the [utilities], absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] amendment.

Id. at 144 (footnote omitted).

Tennessee Electric does not preclude Guillen's standing here. This case does not directly present a question whether Section 409 violates the Tenth Amendment, in the sense of invading a sphere of sovereignty reserved to the States or impermissibly interfering with the governmental structure of the States.[19] Although the Washington Supreme Court

[19] This Court has used the terminology of the "Tenth Amendment" to refer to a variety of constitutional concepts grounded in federalism, but most often it has used that term to refer to "the province of state sovereignty reserved" by the Constitution, as opposed to the limitations on federal power inherent in the fact that the federal government was delegated only limited and enumerated powers. See *New York* v. *United States*, 505 U.S. 144, 155, 160 (1992); see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 463 (1991); *South Carolina* v. *Baker*, 485 U.S. 505, 513 (1988); *FERC* v. *Mississippi*, 456 U.S. 742, 753-771 (1982); *id.* at 775-779 (O'Connor, J., concurring in the judgment in part and dissenting in part); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289-293 (1981).

referred in passing in its decision to the Tenth Amendment (see Pet. App. A78-A79) and to Section 409's effect on state sovereignty (*id.* at A108-A110), its decision focused on whether the "collected" prong of Section 409 exceeds the permissible reach of Congress's Article I powers because it is not related to any legitimate federal interest (*id.* at A84-A108). The Washington Supreme Court did *not* express any doubt that Congress has authority to prescribe rules of privilege applicable in state-court litigation (as well as in federal courts), provided that the subject matter of the privilege lies within a power constitutionally delegated to Congress—just as the federal government has authority within its delegated powers to preempt state-law causes of action entirely, cf. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993). Indeed, the Washington Supreme Court acknowledged that Section 409's privilege for materials "created" for Section 152 purposes is constitutional and enforceable in state courts. See Pet. App. A107.

Once it is understood that Guillen's challenge to Section 409 involves alleged limitations on Congress's delegated powers rather than an alleged incursion on state sovereignty, it becomes clear that the Court may adjudicate Guillen's constitutional claim, even if neither the State nor the County joins in his challenge. This Court has adjudicated numerous cases in which federal statutes were challenged as lying beyond the reach of Congress's Commerce Clause power, even when the State where the regulated activity took place raised no objection to the statute. See, *e.g.*, *United States* v. *Lopez*, 514 U.S. 549 (1995); *Perez* v. *United States*, 402 U.S. 146 (1971). The Court also upheld,

on the merits, the federal social security tax against a challenge that the purposes to which the proceeds of the tax were to be applied lay beyond Congress's power to spend for the general welfare. In that case, the challenge was raised by a derivative shareholder of an employer subject to the tax, not the State. See *Helvering* v. *Davis*, 301 U.S. 619, 640-645 (1937).

The Court has in other cases considered (and rejected) contentions *by a State* that restrictions imposed on States (or their officials) as a condition or consequence of the State's acceptance of federal funds violated constitutional principles of federalism, including limitations on Congress's spending power. See *South Dakota* v. *Dole*, 483 U.S. 203 (1987) (upholding Act of Congress directing that percentage of federal highway funds be withheld from any State that permits sale of alcohol to anyone under 21 years of age); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) (upholding Act of Congress restricting political activities of state officials whose employment was financed by federal funds). The County suggests that, if the State manifests its acceptance of the federal funds along with the federal conditions and decides not to challenge those conditions, a private individual in the State adversely affected by the conditions cannot raise any challenge based in the Spending Clause to the federally imposed conditions.

The County's argument might have merit in a case where the federal statute had required the State to change its laws as a condition of accepting federal funds, and the State had done so. For example, if, in response to the statute challenged in *South Dakota* v. *Dole*, a State had "succumb[ed] to the blandishments offered by Congress and raise[d] its drinking age to 21," 483 U.S. at 211, it is difficult to see how a private individual under the age of 21 who wished to purchase alcohol could have established standing to challenge the *federal* statute. The state law would stand as an

independent barrier to that individual's ability to purchase alcohol. The individual could not show that his injury would be redressable by a federal court order invalidating the federal law. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 569-571 (1992) (opinion of Scalia, J.).[20]

Section 409 is not structured in that fashion, however. It does not require the state government to take any affirmative act to adapt any provision of *state* law governing the discovery or admissibility into evidence of specified materials as a condition to participating in a federal funding program. Rather, Section 409 embodies a rule of *federal* law that directly precludes certain materials from being disclosed in the course of discovery or admitted into evidence at trial. Although it establishes a binding rule of decision to be applied in state (and federal) courts, it is in that sense no different from any federal law preempting a state-law rule of decision. Section 409 operates directly on individual litigants, by depriving them of their state-created right to obtain certain information. Those adversely affected individual litigants may raise a constitutional challenge to Section 409.[21]

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[20] Thus, in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), the Court expressed doubt that an Alabama employer could challenge the constitutionality of the federal unemployment compensation tax on the ground that the federal statute had impermissibly coerced the States into establishing their own unemployment compensation funds. In that case, the State of Alabama had established its own compensation fund, and by operation of the federal statute, the employer received a credit against its federal tax liability to reflect part of the amount that it was obligated to pay the State. At least as to the amount of its obligation to the State, the Court remarked, the employer could not claim to be "coerced through the operation of [the federal] statute," for it "pa[id] in fulfillment of the mandate of the local legislature." *Id.* at 589.

[21] Moreover, under any plausible theory, it is clear that a litigant who may be adversely affected by Section 409, such as Guillen, could argue that Section 409 does not apply to his discovery requests and could invoke the principle of constitutional avoidance in support of that argument. It

II. SECTION 409 DOES NOT BAR DISCOVERY OF MATERIALS FROM A STATE OR LOCAL GOVERNMENTAL AGENCY THAT NEITHER COMPILED NOR COLLECTED THE MATERIALS FOR A PURPOSE RELATED TO SECTION 152, EVEN IF THE SAME MATERIALS HELD BY ANOTHER AGENCY WOULD BE PRIVILEGED

A. The Text, Background, And Purposes Of Section 409 Lend No Support To The Washington Supreme Court's Broad Construction Of The "Collected" Prong

1. The Washington Supreme Court construed the "collected" prong of Section 409 to bar the discovery of materials held by a governmental agency that neither compiled nor collected the materials for reasons related to Section 152, as long as another agency or office within the State or local governmental entity subsequently collected the same material for its own, Section 152-related purposes. The Washington Supreme Court believed that no coherent distinction could be drawn between the original versions of traffic accident reports held by a local law enforcement agency that generated those documents for routine, law enforcement purposes unrelated to Section 152, and copies of the same accident reports subsequently transmitted to a county agency that used those materials for Section 152-related purposes (which copies would plainly be privileged). See Pet. App. A67-A68. The court further ruled, however, that this broad application of the Section 409 privilege served no legitimate federal purpose and therefore could not be sustained under Congress's Article I powers. Accordingly, the court ruled that the Section 409 privilege may validly protect

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would an odd result if that litigant could not also challenge Section 409 directly as in excess of Congress's powers under Article I.

only materials that were *originally generated* ("compiled") for a Section 152-related purpose.

As the concurrence explained, however, the Washington Supreme Court's constitutional ruling was premised on an incorrect reading of Section 409. Section 409 precludes the discovery and introduction into evidence only of materials that were compiled or collected for a Section 152-related purpose. The privilege has no application when materials are sought from an entity that compiled or collected them for reasons unrelated to Section 152, even if another entity subsequently gathered or used the materials for a Section 152 purpose. Properly construed in that manner, Section 409 raises no constitutional concerns.

The Washington Supreme Court suggested, however, that the distinction between copies of documents "as held" by one agency and copies "as held" by another would soon lose force, as local governments move from paper documents to networked, computer-based, digital storage systems. See Pet. App. A67-A68. That concern is not without force. Indeed, it is of particular interest to the Department of Transportation, which has consistently urged States and local governments to standardize their accident reporting systems, to move towards digital storage systems, and to use networked systems to make the information on accident reports available throughout States and local governments. As we explain below, it may well be the case that, if the only information about an accident is available on such a computer-based system, and if that computer-based system was established at least in part to facilitate applications for federal funds under Section 152, information stored on that computer-based system would be privileged. See pp. 36-39, *infra*. But the privilege does not extend to originals of traditional, paper accident reports still maintained by a law enforcement agency that generated those reports for routine law enforcement purposes, even if the same reports are later

transmitted to a state or local public works agency that uses them for Section 152-related purposes.

2. The text, purposes, and background of Section 409 lend no support to the Washington Supreme Court's broad construction of the privilege.

a. The text of Section 409 is, at a minimum, readily susceptible of a narrower construction than that offered by the Washington Supreme Court. Section 409 provides a privilege for "reports * * * compiled or collected for the purpose of * * * planning the safety enhancement of * * * hazardous roadway conditions * * * pursuant to" Section 152. Under a straightforward application of that statutory language, when the Section 409 privilege is claimed for a particular document or set of materials, the court must ask whether that document or set of materials was either compiled or collected for such a purpose. If a particular document, as held by the agency that maintains it in its custody (for example, a local law enforcement agency), was neither compiled nor collected for such a purpose, it would not be privileged—even if a copy of the same document or the same information, as held by another agency (for example, a planning agency), would be privileged because the state highway department or local planning agency had collected the materials for Section 152-related purposes.[22]

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[22] This Court has previously noted that copies of documents held by one party may not be privileged, even when the law bars disclosure of other copies of the same documents that are in the custody of another entity. In *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), the Court held that the version of Section 9(a) of the Census Act, 13 U.S.C. 9(a) (1958), in effect at the time did not provide a privilege for copies of reports that a company had submitted to the Census Bureau, even though the same provision barred the Census Bureau itself from disclosing its own copies of the same reports. See also 368 U.S. at 218-219 (noting same principle governing discoverability of trade secrets and copies of tax returns).

Thus, for example, if discovery were sought from a county or a county sheriff's office seeking all reports that the sheriff's office had received or generated about accidents at a certain location within a certain number of years, and if the sheriff's office had received or generated those reports for routine law enforcement purposes, a court should not conclude that the sheriff's office had either "compiled or collected" those reports for Section 152-related purposes. That would be true even if copies of those accident reports already had been, or were later, transmitted to the state highway department or county planning agency, which intended to use them for its own Section 152-related purposes. Although the reports in the control of the highway department or the planning agency would have been "collected" by the highway department or planning agency for Section 152-related purposes and thus would be privileged under Section 409, it does not follow that the highway department's or planning agency's use of the information in those documents for Section 152-related purposes would retroactively render privileged the version of the documents that the sheriff's office had previously generated, and had maintained, for its own law enforcement purposes.[23]

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[23] The difference between accident reports as held by the sheriff's department and accident reports as held by a state highway department or local planning agency could be significant in many cases. A county sheriff's department, for example, might index the reports by the identity of the driver or the date of the accident, rather than location of the accident. Such a collection of reports would be of little use to a tort plaintiff who was attempting to prove that a specific location was particularly dangerous, or that authorities knew that that location was particularly dangerous. Depending on the circumstances, such a sheriff's office might also be able to argue that requiring it to retrieve its accident reports by location would be unduly burdensome under applicable discovery rules. The state highway department or local planning agency, however, might well index accident reports by location, especially if it used those reports to prepare applications for Section 152 funds. A

The Washington Supreme Court has apparently read Section 409 to provide that, if a copy of a document is ever "collected" by *anyone* for Section 152-related purposes, then all preexisting copies of that document become privileged. Presumably, under that reading, if a county planning office obtained accident reports from the state highway patrol (or a private party) for the County's Section 152-related purposes, then the originals of the accident reports maintained by the state highway patrol (or the private party) would also be privileged under Section 409, because the reports were subsequently "collected" by someone—the County—for Section 152 purposes. It is far more natural to read Section 409 as barring discovery of a document only if that particular document, or an earlier version of it, was collected or compiled for Section 152-related purposes.[24]

b. This construction of Section 409 also finds support in the background and purpose of that provision. Before 1995,

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collection of information about locations could prove much damaging to a State or local government in subsequent tort litigation.

[24] If a county planning agency collected information for its own Section 152-related purposes and then subsequently transmitted that information to another agency that used the information for non-Section 152-related purposes, the information in the hands of the transferee agency would nonetheless be privileged under Section 409. That is so because the information or documents held by the transferee agency would not have existed but for the planning agency's collection of that information for Section 152-related purposes. Even in the hands of the transferee agency, the information would still have been "collected for the purpose of" (23 U.S.C. 409) preparing an application for funds under Section 152. In a somewhat analogous context, this Court has held that Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7), which exempts from disclosure certain "records or information compiled for law enforcement purposes," covers information that was originally compiled by a law enforcement agency for a law enforcement purpose, but was subsequently summarized and recompiled for another entity that used the information for non-law-enforcement purposes. See *FBI* v. *Abramson*, 456 U.S. 615, 624-625 (1982).

the privilege extended only to materials and data that were "compiled" for the purpose of seeking funds under Section 152. See 23 U.S.C. 409 (1994). Some state courts had interpreted the privilege narrowly, ruling that it protected a government agency's evaluations of road safety hazards but not the raw data that the agency had collected to make those evaluations. See p. 5, *supra*. Congress's extension of the privilege in 1995 to include materials that were "collected" for Section 152-related purposes was intended to overrule those decisions and ensure that "raw data collected prior to being made part of any formal or bound report" that a State or local government submitted as part of an application for funds under Section 152 would be privileged. See H.R. Rep. No. 246, *supra*, at 59; H.R. Conf. Rep. No. 345, *supra*, at 90.

Congress was concerned that States and local governments that wanted to apply for federal funds for road hazard elimination would be less than completely thorough or candid in their evaluations of hazards within their jurisdictions if the materials they assembled to make those evaluations could be used against them in tort litigation. Thus, as the committee reports make clear, Congress intended to protect the "raw data" that a governmental entity collected before *that entity* placed its evaluation of the data (or the data themselves) in any "formal or bound report." That protection removes any disincentive that the entity might have had in assembling the material necessary to prepare a thorough and candid Section 152 application. As Justice Madsen stated below, Congress wanted to ensure that Section 152 applications and their supporting documentation were not converted into "a work free 'tool' to use in civil litigation" for tort plaintiffs against state and local governments. Pet. App. A116.

There is no evidence, however, that Congress wanted to put potential tort plaintiffs in a *worse* position than they would have occupied had Section 152 never been enacted.

Yet that is essentially the effect of the Washington Supreme Court's treatment of Section 152's "collected" prong. Under that reading, even materials that tort plaintiffs would have routinely been able to obtain under state law—such as accident reports compiled and maintained by local law enforcement agencies for their own routine purposes—would become privileged merely because another agency later used copies of those reports in pursuance of a Section 152 application. That construction converts Section 409 from a shield into a sword: it goes well beyond preventing the *federal* application process under Section 152 from being used as a tool in civil litigation against local governments, and allows local governments to fend off litigation that they would have faced under *state* law if that application process had never existed.

Contrary to the Washington Supreme Court's reading, the 1995 amendment to Section 409 did not break the link between the privilege and the federal transportation safety programs. Section 409 applies only to materials compiled or collected "*for the purpose of* identifying, evaluating, or planning the safety enhancement of potential accident sites [or] hazardous roadway conditions * * * pursuant to section 152. 23 U.S.C. 409. A document in the custody of a law enforcement agency that compiled or collected the document for reasons completely unrelated to Section 152 cannot be said to have been compiled or collected "for the purpose of" making the necessary evaluations under Section 152.[25]

[25] The Washington Supreme Court thought it would be unworkable to distinguish between an agency that collects materials for reasons unrelated to Section 152 and an agency that subsequently collects the same materials for a Section 152 purpose, because some small governmental entities might maintain only a single set of records. Pet. App. A66. As we explain below, the observation that governmental entities might maintain only a single set of records has some force, especially in light of developments of computer systems for storage of accident information. See pp. 36-39, *infra*. The court's observation does not render the distinction unworkable in the general run of cases, however, where local law enforcement agencies still retain original versions of their own accident reports. Indeed, state courts have applied the distinction between documents held by agencies performing Section 152-related purposes and documents held by other agencies without apparent difficulty. See *Ex parte Ala. Dep't of Transp.*, 757 So. 2d 371, 374 (Ala. 1999) (holding that Section 409 precluded the plaintiff from obtaining information from the Alabama Department of Transportation, but noting that the information the plaintiff sought was "under the custody and control of the Alabama Department of Public Safety" and that the plaintiff thus was "not without a source for the information"); *Irion* v. *Louisiana Dep't of Transp. & Dev.*, 760 So. 2d 1220, 1226 (La. Ct. App.) (the fact that accident reports collected by the Louisiana Department of Public Safety for law enforcement purposes were subsequently used by the State's Department of Transportation in seeking federal funds did not make the underlying facts inadmissible), writ denied, 773 So. 2d 727 (La. 2000).

3. Two additional factors point away from the broad construction placed on Section 409 by the Washington Supreme Court.

First, if there is some remaining uncertainty about the proper scope of Section 409, resolution of that uncertainty may properly be informed by the principle that, because evidentiary privileges "are in derogation of the search for truth," they are to be narrowly construed. *United States* v. *Nixon*, 418 U.S. 683, 709-710 (1974); see also *University of Pa.* v. *EEOC*, 493 U.S. 182, 189 (1990); *Trammel* v. *United States*, 445 U.S. 40, 50 (1980); *Herbert* v. *Lando*, 441 U.S. 153, 175 (1979); *Branzburg* v. *Hayes*, 408 U.S. 665, 690 & n.29 (1972). That principle is applicable to privileges created by statute as well as those established at common law. *Baldrige* v. *Shapiro*, 455 U.S. 345, 360 (1982); *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 218 (1961). Thus, although Section 409 must be applied according to its terms and purposes to bar discovery and admission in to evidence of

privileged data, it should not be read expansively so as to "suppress otherwise competent evidence." *Ibid.*

Second, the Washington Supreme Court acknowledged that the constitutional infirmities it found in Section 409 arose solely because, in its view, the statute reached materials originally prepared for routine state and local purposes and held by entities with no Section 152 functions. See Pet. App. A91, A104-A105. That constitutional doubt, however, should have counseled the court against adopting a broad construction of the statute where, as here, a narrower one fully consistent with the Constitution is readily available. See *Raygor* v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1006 (2002); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 77-79 (1994); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

B. Information Stored Only In A Computer-Based Storage System Accessible To Several Agencies May Be Privileged Under Section 409, Even When It Is Retrieved By An Agency That Performs No Section 152 Functions

As the Washington Supreme Court observed, recent and continuing developments in information technology may soon allow States and local governments to store accident report information only in a single set of electronic files, to which all agencies having a need for such information could gain access by a networked computer system. See Pet. App. A66-A67. These developments present a challenge in applying Section 409, for, as the court below noted, once such a networked system is put in place, it may represent the only existing collection of accident reports and data. A state or local agency would obtain accident report information only by gaining access to the system. In such a situation, there would be no distinction between the information as held by a

county law enforcement agency and the information as held by the county planning office.

In our view, the existence of a single, networked, computer-based system for storage of accident report information to be used by agencies for several purposes—including Section 152-related purposes—*would* change the analysis. It is important to understand that the basic reasons for the very existence of such computer-based data storage systems include facilitating applications for hazard improvement funds under Section 152. Such systems are often established and designed specifically with a view to facilitating the Section 152 application process, and federal funds are provided for such purposes.[26]

Section 402 of Title 23 directs the Secretary of Transportation to establish "a highway safety program for the collection and reporting of data on traffic-related deaths and injuries by the States," 23 U.S.C. 402(a), and authorizes the appropriation of funds to assist the States in implementing such programs, 23 U.S.C. 402(c). Section 411 of Title 23 further directs the Secretary to make grants to the States for programs to improve highway safety data—including, specifically, programs to "improve the timeliness, accuracy, completeness, uniformity, and accessibility of the data of the State that is needed to identify priorities for national, State, and local highway and traffic safety programs," 23 U.S.C. 411(a)(1)(A), and to "link these State data systems, *including traffic records*, with other data systems within the State, such as systems that contain medical and economic data," 23 U.S.C. 411(a)(1)(C) (emphasis added). The Secretary's regulations implementing Section 411 make clear that the pur-

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[26] Indeed, the Department of Transportation's regulations implementing Section 152 require the States to have "[a] process for collecting and maintaining a record of accident, traffic and highway data." 23 C.F.R. 924.9(a)(1).

poses of a federal grant under that part include improvement of the "timeliness, accuracy, completeness, uniformity, and accessibility of the data needed by each State to identify highway safety priorities." 23 C.F.R. 1335.2; see also 23 C.F.R. 1335.10(b)(1).[27]

Under these funding programs, States receive grants from the Department of Transportation under Section 411 to establish computer-based systems that are intended, *inter alia*, to make it easier for States and local governments to retrieve and use the information on accidents that is needed for preparing applications for hazard improvement funds under Section 152.[28] The very existence and nature of the system ensure that data entered into the system will be available for Section 152-related purposes (as well as other purposes). As a result, all accident report information entered into such a system has been "collected" for a Section 152-related purpose (although it may also have been collected for other purposes).

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[27] The Department has also assisted the States in identifying the information needed for such a computer-based system and the format in which such information should be prepared. See 23 U.S.C. 411(a)(2) (directing the Secretary to determine the "model data elements necessary to observe and analyze national trends in crash occurrences"). The Department has, for example, prepared a report identifying model minimum uniform crash criteria to be used for statewide motor vehicle traffic crash data systems. See United States Dep't of Transportation, *Model Minimum Uniform Crash Criteria* (Aug. 1998) (lodged with the Clerk). The Department has also prepared a catalogue of crash report forms used in each of the States, and has placed those forms on the internet. See United States Dep't of Transportation, *State Crash Report Forms Catalog 1999 Update* (lodged with the Clerk).

[28] Congress authorized $932.5 million to be spent under Section 402 for Fiscal Years 1998-2003, and $32 million to be spent under Section 411 for Fiscal Years 1999-2002. See Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 2009, 112 Stat. 337 (1998).

That is so even though (to use the example given by the Washington Supreme Court, see Pet. App. A66) a law enforcement officer who enters accident report information into the system may not be subjectively aware, at the time that he does so, that that information will be available on the system for a planning agency's Section 152-related needs. The information exists in one place, and it exists there in part for a Section 152-related purpose. That information is therefore covered by the Section 409 privilege.[29]

It is not clear whether, on the facts of this case, the County might claim the benefit of Section 409 by arguing that its accident report information resided on such a computer-based system. Evidence in the record suggests that the County Public Works Department obtained paper copies of accident reports from the state patrol, the county sheriff, and other local law enforcement agencies. See J.A. 53-54. As we have explained, any versions of those accident reports that were still maintained by the transferor agencies would not be privileged under Section 409, if the originating agencies collected and compiled them for purposes entirely unrelated to Section 152. A remand may be necessary, however, to establish whether the contested documents and information in this case are privileged under Section 409, as properly construed.[30]

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[29] If the information on the computer system were privileged under Section 409, it would remain privileged even if a local law enforcement agency subsequently printed out a copy of that information for its own, non-Section 152-related purposes. Just as information contained in paper records that were once "collected" by a planning agency for Section 152-related purposes would remain privileged even after those records were transferred to another agency using them for other purposes (see p. 32, n.24, *supra*), so also information that has been "collected" on a networked computer-based system for Section 152-related purposes remains "collected" for that purpose even after it has been printed out.

[30] As we understand the record, the County's Public Works Department, as part of its process of preparing a Section 152 application, ob-

III. SECTION 409 DOES NOT EXCEED CONGRESS'S POWERS UNDER ARTICLE I OF THE CONSTITUTION

Properly construed, Section 409's application to materials "collected" for Section 152-related purposes is plainly a legitimate exercise of Congress's Article I powers.

First, even though Section 409 is part of a federal spending program, it can be sustained as an exercise of Congress's authority under the Commerce Clause, for it substantially advances the national interest in transportation

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tained a list of accidents from the state patrol and may also have obtained accident reports from various law enforcement agencies including, but not limited to, the County's own sheriff's department. See Pet. App. A9-A10; J.A. 47-48, 53- 54. If the County Public Works Department obtained the list of accidents and accident reports from sources outside the County, that information would likely be privileged in the hands of the County under Section 409 because it would have been "collected" by the County for a Section 152-related purpose.

Whether the information would be privileged under Section 409 in the hands of the state patrol would depend on the purposes for which the state patrol had collected or compiled the information. If, for example, the state patrol compiled a list of accidents in response to a request from the County Public Works Department, the list would likely be privileged because the patrol would have compiled it for the purpose of assisting the County's Section 152 application. On the other hand, routine law enforcement records underlying that list, such as accident reports generated by the state patrol, would likely not be privileged under Section 409. State law, however, might not permit Guillen to obtain discovery of those law enforcement records from the state patrol, if the state patrol could show that responding to such a discovery request would be unduly burdensome. In addition, the record suggests that the County's Public Works Department may have retransmitted some of this information to other entities within the County. See J.A. 51. For the reasons explained at p. 32 n.24, *supra*, the information, if privileged in the custody of the Public Works Department, would remain privileged when held by the transferee agency.

safety.[31] Interstate commerce depends vitally on safe intersections, highway bridges, and rail-highway crossings. Hazardous conditions at such vulnerable points in the Nation's transportation system literally impede the flow of interstate commerce.

Section 409 encourages the States to evaluate those hazardous conditions and to take the steps necessary to ameliorate them (including utilizing federal funds under Section 152), which in turn permits commerce to circulate more freely. Congress reasonably concluded that, without a privilege

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[31] This Court has never suggested that measures enacted in connection with a federal spending program may be sustained *only* as an exercise of Congress's spending power. In *South Dakota* v. *Dole*, the government defended the challenged federal statute, which required the Secretary of Transportation to withhold a percentage of federal highway funds from any State that allowed persons under 21 years old to purchase or publicly possess alcohol, under both the Commerce Clause and the Spending Clause. South Dakota maintained that the Twenty-first Amendment precluded the government from relying on the Commerce Clause. The Court found it unnecessary to resolve the Commerce Clause and Twenty-first Amendment issues, and instead sustained the statute under Congress's spending power. See 483 U.S. at 205-206.

In this case, there is no independent constitutional principle, such as the Twenty-first Amendment, that would prevent Congress from acting under the Commerce Clause to establish the privilege in Section 409. Although the Section 409 privilege applies in both state-court and federal-court litigation, that fact raises no concerns about constitutional principles of federalism. It is a commonplace that Congress may, in pursuit of legitimate federal regulatory objectives, bar state-law causes of action entirely. See *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). The Court has also made clear that Congress can displace state-court procedural rules that interfere with federal interests in a federal cause of action. See *Felder* v. *Casey*, 487 U.S. 131, 141-153 (1988); *id.* at 153-156 (White, J., concurring). Congress likewise has the authority under Article I to bar the discovery of evidence that would be relevant to a state-law cause of action in state court, if such discovery would impair federal regulatory objectives.

covering information that States and local governments compiled and collected to evaluate hazardous conditions within their jurisdictions, those entities might be so concerned about exposure to liability that they might not assemble the necessary information, or might not be optimally thorough and candid in doing so. By encouraging States and local governments to take steps that will lead to improvements in the Nation's transportation system, Section 409 serves to protect both the "channels of interstate commerce" and the "instrumentalities of interstate commerce." See *United States* v. *Lopez*, 514 U.S. 549, 558 (1995). Indeed, as a measure designed to protect and regulate transportation, Section 409 stands in a line of venerable authority dating back to *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

Second, Section 409 is a valid exercise under the Necessary and Proper Clause of Congress's power to ensure that its spending programs for highway safety remain effective. There is no dispute that Congress may legitimately act, under the Spending Clause and Commerce Clause, to provide the States with funds necessary to ameliorate highway hazards, as it has done under 23 U.S.C. 152. Congress has the constitutional authority to ensure that this funding program is not undermined by the concerns about liability discussed above. It is necessary and proper for Congress to ensure that local jurisdictions are not chilled from being candid and thorough in utilizing federal funds out of a concern that doing so might effectively subject them to liability for damages in a tort action.

Finally, the privilege conferred by Section 409 is itself a proper exercise of Congress's Article I spending power, because it is a legitimate incident of the national program to improve transportation safety by providing funds to the States for amelioration of hazardous highway conditions. If a State applies for federal funds under Section 152, it accepts, as a condition of participating in the federal program,

that the information compiled or collected for the purpose of making such an application will not be admissible in its own courts. The State of Washington is free to decline to participate in the program, but it has voluntarily chosen to do so and has expressly assented to the conditions incident to that program. See Wash. Rev. Code Ann. § 47.04.050 (West 2001).[32]

"Congress may attach conditions on the receipt of federal funds" even if those conditions would not be authorized by "the direct grants of legislative power found in the Constitution." *South Dakota* v. *Dole*, 483 U.S. at 206, 207. This Court has suggested that conditions on federal spending programs "might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." *Id.* at 207 (internal quotation marks omitted). But the privilege of Section 409, designed to encourage the States to detect and address hazardous highway conditions, is closely related to the legitimate federal interest in national transportation safety reflected in the Nation's transportation-safety laws, including Section 152. See *id.* at 208 (observing that the funding conditions challenged in *South Dakota* v. *Dole* satisfied the "nexus" requirement because they were "directly related to one of the main purposes for which highway funds are expended—safe interstate travel").[33]

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[32] See *Sawyer* v. *Illinois Cent. Gulf R.R.*, 606 So. 2d 1069, 1074 (Miss. 1992) ("[N]obody made Mississippi get into the * * * safety enhancement program. It is a voluntary program."); *Claspill* v. *Missouri Pac. R.R.*, 793 S.W.2d 139, 140-141 (Mo.), cert. denied, 498 U.S. 984 (1990); *Martinolich* v. *Southern Pac. Transp. Co.*, 532 So. 2d 435, 438 (La. Ct. App. 1988), writ denied, 535 So. 2d 745 (La.), cert. denied, 490 U.S. 1109 (1989).

[33] Other than the decision of the Washington Supreme Court in this case, federal and state courts have uniformly recognized that the privilege of Section 409 is directly related to the goal of improving highway safety, in that it is designed to encourage the candid gathering, evaluation, and communication of safety data without fear that the data or reports will be used in litigation. As the Eighth Circuit stated, "the underlying intent of

That point is unassailably true in light of the proper construction of "collected" in Section 409 that we have outlined in Part II, *supra*, for the privilege does not cover materials that are collected and maintained by local governmental agencies for their routine local law enforcement purposes alone, and not also for Section 152-related purposes. Rather, as the language of Section 409 itself makes clear, the privilege reaches only materials and information that were demonstrably collected or compiled *for a Section 152-related purpose*. The nexus to the federal spending program is therefore inherent in the statutory condition for the application of the privilege.[34]

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the statute is to facilitate candor in administrative evaluations of highway safety hazards." *Robertson*, 954 F.2d at 1435 (internal quotation marks omitted). See also *Harrison* v. *Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Rodenbeck* v. *Norfolk & W. Ry.*, 982 F. Supp. 620, 623 (N.D. Ind. 1997); *Shots* v. *CSX Transp., Inc.*, 887 F. Supp. 204, 205 (S.D. Ind. 1995); *Reichert*, 694 So. 2d at 197.

[34] Congress's Article I power to promote transportation safety covers as well the situation we have described (pp. 36-39, *supra*) where a State or local government maintains all of its accident data on one integrated computer system. As we have explained, because the accident data on such systems is maintained in only one place, it is impractical to distinguish between data held by one agency for Section 152-related purposes and data held by another agency for other purposes. Rather, it is inherently the case that, when the accident information is entered onto the system, it is "collected" for a Section 152-related purpose (among others).

Furthermore, such computer systems are themselves at least in part a product of a federal spending program authorized under Sections 402 and 411. See pp. 36-39, *supra*. Congress can permissibly extend States and local governments an incentive to accept federal funds for the establishment of such computer systems by providing that, if one of the purposes for which accident report information is entered onto such a system is to ensure its ready availability for Section 152 purposes, then that information will be privileged in damages actions against the States and local governments. If States and local governments believed that accident report information that would be privileged when held by one agency (such as a county planning agency) would become available in discovery if it were placed on a system available to all of the jurisdiction's agencies, they might well be deterred from accepting federal funds under Section 411 to develop such a computer system. Indeed, Congress could permissibly have concluded more generally that the benefits of offering States and local governments the incentive to gather and evaluate transportation safety-related information thoroughly and candidly would have warranted a broader privilege that would afford some protection to certain safety-related information even as gathered and held by agencies other than those that prepare applications for Section 152 funds, such as law enforcement agencies.

Nor can Guillen challenge Section 409 on the ground that the financial benefits offered to Washington in the highway safety funding program impermissibly "coerce" the State into accepting the condition that any information collected by the State and local governments for Section 152-related purposes will be privileged. Whatever might be said of the *State's* ability in theory to challenge Section 409 on the ground that th highway funding program is coercive, cf. *South Dakota* v. *Dole*, 483 U.S. at 211-212, a claim based on such alleged coe[illegible]ised by a private individual like Guillen has no force when the State has voluntarily agreed to participate in the program, has assented to the conditions, and has expressly opposed Guillen's challenge. This Court rejected a similar claim of coercion in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), where an employer subject to federal unemployment compensation tax argued that the tax had coerced the States into establishing their own unemployment compensation funds, by subsidizing those state funds and providing that the covered employer would receive a credit against his federal unemployment tax liability if he paid taxes to a state fund. The Court ruled there that the State of Alabama was not coerced because "[e]ven now she [the State] does not offer a suggestion that in passing the unemployment law she was affected by duress. For all that appears she is satisfied with her choice, and would be sorely

disappointed if it were now to be annulled." 301 U.S. at 589 (citations omitted).

So too here, neither Pierce County nor the State of Washington has offered any suggestion that it was affected by duress in applying for and accepting federal hazard elimination funds under Section 152. To the contrary, Pierce County has come to this Court as petitioner to defend the constitutionality of Section 409, and the State of Washington supports the federal statute as well. In the voluntary acceptance of funds by the State and the County subject to Section 409 and other conditions—and the absence of objection by either to Section 409—it cannot be said that either entity is "coerced" in any meaningful sense into accepting the federal evidentiary privilege, which is indeed provided largely for their benefit, under Section 409.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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